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IN THE

Supreme Court of the United States

October Term, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Public Utility District No. 2 of Grant County, Washington, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

Opinions were rendered by the District Court for the Southern District of New York (GREGORY F. NOONAN, D. J.), and by the Court of Appeals (MEDINA, WATERMAN and SMITH, C. JJ.).

The District Court's opinion is reported in 207 F. Supp. 443 and is printed in Appendix A hereto, *infra* at pp. 1a-12a. The Court of Appeals rendered three separate opinions: one, per MEDINA, C. J., with its original decision of April 22, 1963; a second, *per curiam* dated May 17, granting—on the ground of the novelty of some of the questions discussed in the original opinion—a petition for rehearing to the extent of allowing further and supplemental briefs; and a third, *per curiam* dated June 19, denying the petition for rehearing. All of these opinions are reported in 319 F. 2d 94, 113 and are printed in Appendix A, *infra* at pp. 13a-52a, 53a, 54a-57a. By order entered August 6, a copy of which is printed in Appendix A, *infra* at p. 58a, the full court denied a petition for rehearing *en banc* (FRIENDLY, C. J., not participating; CLARK, MOORE, and HAYS, C. JJ., dissenting and voting to grant rehearing *en banc*).

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1963. A petition for rehearing or in the alternative for rehearing *en banc* was filed on May 7. The original panel denied the petition for rehearing on June 19, and on August 6 the full court (three judges dissenting) denied the alternative petition for rehearing *en banc*. The last day for filing this petition was, by order of Mr. Justice HARLAN dated August 15, fixed at November 4, 1963.

28 U. S. C. §1254(1) confers jurisdiction on this Court.

Question Presented for Review

The Court of Appeals held that governmental property owned by a municipal corporation of the State of Washington and devoted to public use may, in some circumstances, be attached in New York for the purpose of obtaining jurisdiction over such municipal corporation. This holding raises the following question:

> Did the Court of Appeals, in sanctioning such attachment of governmental property devoted to public use, decide an important state question in a way in conflict with applicable New York law?

Statutory Provisions Involved

New York Civil Practice Act §912[1] defines the circumstances in which property may be attached. The section is set forth in Appendix B, *infra* at p. 59a. So far as here pertinent, it provides:

> "The sheriff must execute the warrant immediately, by levying * * * upon so much of the property of the defendant, within his county, not exempt from levy and sale by virtue of an execution * * *."

Under New York decisional law, governmental property devoted to public use is—absent express statutory authority—exempt from levy and sale by virtue of an execution (*infra*, pp. 10-13).

The preamble of the statute of the State of Washington pursuant to which petitioner was established, the act of

1. The Civil Practice Act was in effect at all times here relevant. On September 1, 1963 it was superseded by the Civil Practice Law and Rules (officially cited as "CPLR"). The pertinent provisions of the former Civil Practice Act §912 are now found—without change in substance—in CPLR 6202 and CPLR 5201(a) and (b). Those sections are set forth in Appendix B, *infra* at p. 60a.

Congress authorizing the particular activity giving rise to this lawsuit, and the Washington statutes authorizing suit against petitioner and establishing that its property is not subject to execution—all of which were noted by the Court of Appeals (319 F. 2d at 97, 97-98, 96, *infra* at pp. 16a, 17a-18a, 16a)—are set forth in Appendix B, *infra* at pp. 61a, 62a-65a, 66a-67a.

Statement of the Case

(a) Nature of the action

Petitioner, Public Utility District No. 2 of Grant County, Washington, is a municipal corporation of the State of Washington, organized for the purpose of conserving the water and power resources of that State. In furtherance of this purpose and pursuant to authorization from the Congress, petitioner undertook to build and operate the Priest Rapids Hydro-Electric Project in order to provide flood control and navigation on the Columbia River and to produce public power.

Respondent, a Delaware business corporation, commenced this action against the petitioner in the Supreme Court of the State of New York by attaching certain funds which—as both courts below have found—petitioner had derived from and was using in furtherance of its governmental functions. Such funds consist of two accounts which Bankers Trust Company, a New York bank, is holding as "Construction Fund Trustee" pursuant to arrangements made with the underwriters of a bond issue to finance one part of the Priest Rapids Hydro-Electric Project. More than $17,000,000 is presently under attachment.

The warrant of attachment was issued out of the Supreme Court of New York County. Service of the summons and complaint was subsequently made upon the petitioner at Coulee City in the State of Washington. The action was removed to the District Court on the ground of diversity of citizenship.

Respondent is a general contractor who had been engaged by the petitioner to construct one of the dams for the Priest Rapids Hydro-Electric Project. The action, demanding judgment in the sum of $17,391,012, is on the construction contract. Petitioner declined payment on the grounds that respondent had not satisfactorily performed its contract, and that petitioner's officers had been thwarted by respondent in their investigation into charges—made in a grand jury presentment[2]—of fraud perpetrated by respondent with respect to its contract (see Joint Appendix, pp. 58a-65a).

(b) The decision of the District Court

The District Court vacated the attachment and set aside the subsequent service of summons on the ground that the petitioner, a political subdivision of the State of Washington, had derived the attached property from the performance of governmental activities and was using it in furtherance of governmental functions.

The District Court thus stated its understanding of New York law (207 F. Supp. 445, 446, *infra* at pp. 5a, 7a):

> "Whether or not the property of a municipal corporation is subject to foreign attachment appears to

2. See *State of Washington* v. *Harvey* (1st Dept. 1960) 10 A. D. 2d 691, 198 N. Y. S. 2d 897, appeal dism'd 8 N. Y. 2d 865, 168 N. E. 2d 715, stay pending certiorari denied by Mr. Justice FRANKFURTER on July 5, 1960.

depend upon whether such property is derived from a proprietary function engaged in by the municipal corporation. The law is clear in New York that funds of a municipal corporation collected through ordinary governmental means for local purposes cannot be the subject of attachment.

• • •

"Where, however, it has been shown that property of a municipal corporation has been acquired through a proprietary venture, the courts in New York have allowed a levy of attachment on such property."

After a review of the evidence, the District Court stated the conclusion which impelled it to vacate the attachment (207 F. Supp. at 447, *infra* at p. 12a):

"• • • it is the opinion of this court that Public Utility District #2 is a municipal corporation not engaged in a private and proprietary venture. As such the monies, held by the Bankers Trust Company, in two funds, are not subject to attachment."

(c) The decision of the Court of Appeals

The Court of Appeals sustained the District Court's finding as to the governmental origin and use of the attached property (319 F. 2d at 104-109, *infra* at pp. 33a-43a). It reversed and remanded because, in its view of New York law, such governmental property is not exempt from attachment unless a New York court (or a District Court sitting as a state court in a diversity case) should—in addition to finding the property to be devoted to public purposes—rule that seizure of such property substantially interferes with some essential governmental function (319 F. 2d at 109-113, *infra* at pp. 43a-52a).

The Court of Appeals deemed it unfortunate that no New York authority had attempted "a thorough exposition

of the basic principles" concerning the exemption of governmental property from attachment (319 F. 2d at 110, *infra* at p. 46a). It undertook to make its own "independent analysis" (319 F. 2d at 104, *infra* at p. 32a). As a result of such independent analysis, the Court developed and formulated its above stated view of the law (319 F. 2d at 104, 113, *infra* at pp. 32a, 52a).

The Court of Appeals remanded the action, with instructions that the District Court undertake a "penetrating and thorough study" of the effect of permitting the attachment to stand (319 F. 2d at 104, 113, *infra* at pp. 33a, 51a-52a). Such remand was deemed necessary because "the critical issue" had been "submerged and disregarded by all concerned" (319 F. 2d at 113, *infra* at p. 52a). This situation, the court noted, was "one of the very infrequent by-products of the decisional process, when new law is being developed and formulated" (*ibid.*).

Reason for Allowance of the Writ

The Court of Appeals has decided—in a way in conflict with applicable New York law—an important state question [SUP. CT. RULE 19 1(b)], in that:

> The Court of Appeals erred in departing from settled New York law and applying its own newly "developed and formulated" doctrine as one which New York courts would supposedly adopt (*infra*, pp. 8-18); and
>
> The decision is important because it affects every instrumentality of another state having funds on deposit in New York, and results in an unwarranted extension of the jurisdiction of federal courts sitting in New York (*infra*, pp. 19-21).

I

The Court of Appeals' decision is in conflict with applicable New York law.

A warrant of attachment may, in New York, be levied only upon property that is not exempt from levy and sale by virtue of an execution (CPA §912, *supra*, p. 3). In the absence of express statutory authority, the funds of state instrumentalities are so exempt—at least where such funds are devoted to public and governmental use. *Leonard* v. *City of Brooklyn* (1877) 71 N. Y. 498; *Donner-Hanna Coke Corp.* v. *Eberhardt* (Sup. Ct. Erie Co. 1935) 156 Misc. 41, 280 N. Y. Supp. 607; FORDHAM, LOCAL GOVERNMENT LAW 623 (1949); 1 DILLON, MUNICIPAL CORPORATIONS §248 (5th ed. 1911); see N. Y. COURT OF CLAIMS ACT, §20(3)(5). For example, Dean Fordham's treatise, *supra*, at the page cited, states:

> "Nowhere is there dissent from the proposition that property of a unit of local government presently devoted to a public use and appropriate to that end is free from execution."

The resulting rule is that the property of a governmental instrumentality can be attached only if it be shown that such property is being used in a "proprietary" as opposed to a "governmental" capacity. *Van Horn* v. *Kittitas County, Wash.* (Sup. Ct. N. Y. Co. 1899) 28 Misc. 333, 59 N. Y. Supp. 883, aff'd on opinion below (1st Dept.) 46 App. Div. 623, 61 N. Y. Supp. 1150; *Harman* v. *City of Ft. Lauderdale* (Sup. Ct. N. Y. Co. 1929) 134 Misc. 133, 234 N. Y. Supp. 196; *Dogle* v. *City of Astoria, Ore.* (Sup. Ct.

N. Y. Co. 1932) 147 Misc. 127, 262 N. Y. Supp. 572, aff'd no op. (1st Dept. 1933) 238 App. Div. 833, 262 N. Y. Supp. 973; *Murdock v. City of Asbury Park* (S. D. N. Y. 1942) 48 F. Supp. 18; 10 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE (1954) 91 at p. 135.

CARMODY-WAIT, *supra*, a standard reference work of New York practice, succinctly states the applicable rule at the page cited:

> "Property and property rights held by a municipal corporation in a private and proprietary capacity, *as distinguished from a governmental and political capacity*, are attachable." (Italics supplied.)

The Court of Appeals imposed an additional condition upon exemption of governmental property. Under the newly formulated doctrine, it is not sufficient to find—as did both courts below—that the property is held in a governmental and political capacity. There must be an additional finding— on a case-by-case basis—that the particular seizure attempted would substantially interfere with the public duties of the governmental owner. In summarizing this novel doctrine, the Court of Appeals observed (319 F. 2d at 113, *infra* at p. 52a):

> "We venture the prediction that the rule formulated by us this day, to the effect that a levy under an attachment in a *quasi-in-rem* proceeding against an out-of-state governmental instrumentality will be permitted to stand unless its effect will be substantially to interfere with the performance of the public duties of such instrumentality, rests on a solid foundation and will endure."

It is petitioner's position (a) that the new formulation is contrary to existing New York attachment law, and that no New York court would adopt such a formulation because (b) it is unworkable and (c) it flies in the face of a well-established and important New York public policy respecting suits against governmental instrumentalities.

(a) The new formulation is contrary to existing New York attachment law.

The newly formulated doctrine—that exemption of governmental property from levy and attachment depends not only upon the governmental nature and use of the property, but also requires a case-by-case evaluation of the effect of the particular seizure attempted—is refuted by some of the very authorities cited in its support. See *Leonard v. City of Brooklyn, supra*, 71 N. Y. 498; *Donner-Hanna Coke Corp. v. Eberhardt, supra*, 156 Misc. 41, 280 N. Y. Supp. 607, 609 (cited by the court below, 319 F. 2d at 111, 110 *infra* at pp. 48a, 46a; cf. *Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U. S. 682, 703-704 (cited by the court below, 319 F. 2d at 111, *infra* at p. 47a). Those cases establish that where exemption from judicial interference has been established for a particular category of governmental property or activity, such exemption is absolute and does not—and should not—depend on a case-by-case evaluation of any particular interference.

Leonard v. *City of Brooklyn, supra*, is the New York decision which establishes that governmental property devoted to public use is, absent an express statute, exempt from levy of execution. In that case, the New York Court of Appeals did not go into the question whether the particular property involved was essential to the City's function.

On the contrary, after a discussion of public policy considerations, the court laid down a general rule concerning exemption of property held for public use. It ruled all such property to be exempt, absent specific statutory authorization for a levy. Thus, the court ruled (71 N. Y. at 501):

> "* * * there is no ground for holding that it was the intention of the law-makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express [statutory] provision to that effect."[3]

Donner-Hanna Coke Corp. v. *Eberhardt, supra*, involved a claim for refund of taxes improperly assessed by the City of Buffalo. The court granted mandamus on the ground that judgments against municipal bodies "are not enforceable by execution" (156 Misc. at 42-43, 280 N. Y. Supp. at 609). The amount of the tax claim is not disclosed, but it is inconceivable that the court was under the impression that paying a single taxpayer's claim would substantially interfere with the performance of Buffalo's public duties. It is clear, therefore, that the court considered the exemption to be absolute.

In *Larson* v. *Domestic & Foreign Commerce Corp., supra*, the question was whether a United States District Court had jurisdiction to enjoin an officer of the War Assets Administration. At the pages cited by the court below, this Court outlined the "strongest reasons of public policy" which require that an agency of government

3. There exists express statutory provision for levy of execution against certain cities in specified circumstances after final judgment. See, *e.g.*, *Kelly* v. *City of Yonkers* (2d Dept. 1934), 242 App. Div. 798, 274 N. Y. Supp. 781.

should not be subject to injunction. However, the Court refused to consider whether those policy reasons were applicable to the specific case before it. Thus, speaking through Mr. Chief Justice Vinson, the Court observed (337 U. S. at 704-705):

> "We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case."

In addition to its reliance upon opinions such as those discussed above, the Court of Appeals noted that the New York Civil Practice Act may allow the garnishment of a debt owed by a governmental body (319 F. 2d at 112, *infra* at p. 49a). It therefore concluded that there was no reason to suppose that New York would, in a situation such as the one at bar, object to attachment of a governmental fund (*ibid.*). The conclusion does not follow from the premise. Rules concerning garnishment of debts owing by a governmental body are irrelevant to any consideration of the law of attachment of governmental property.

Garnishment of a debt *owed by* a governmental body is wholly different in theory and effect from attachment of governmental property. Such garnishment—while it might cause bookkeeping inconvenience—cannot prevent the continued use of governmental property. It results only in the substitution of one creditor of the governmental body for another. No governmental property is taken from the custody of its owner.

Attachment of governmental property, on the other hand, immediately withdraws from public use for the plain-

tiff's benefit the specific governmental asset selected by plaintiff. Where the attachment, like the one at bar, is incidental to an attempt to obtain jurisdiction, the property is placed *in custodia legis* and the government is deprived of its use for an indefinite period of time, even though the plaintiff be ultimately defeated in the action.

To summarize: In New York, property exempt from levy of execution may not be attached. Public-purpose governmental property is exempt from levy of execution in the absence of express statutory authority. There exists no such statutory authority applicable to the case at bar. It follows that petitioner's public-purpose property may not be attached, and that there is no basis in law for the contrary doctrine newly "developed and formulated" by the Court of Appeals.[4]

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4. So far as we have been able to determine, no American court has ever before required that inquiry into possible interference—substantial or otherwise—with essential public functions be made a condition to the exemption of governmental property from attachment. The court below, conceding it could find "no New York authority on the point", noted that "a number of authorities in other jurisdictions find quite significant the fact of the completion of a contractor's obligations" (319 F. 2d at 111, *infra* at pp. 48a-49a). With one exception, each of the authorities in other jurisdictions cited as "analogous" (319 F. 2d at 111-112, *infra* at p. 49a) deals with the garnishment of a debt *owing by* a governmental body, and is here inapplicable. In such a garnishment case, under New York law, "the fact of the completion of a contractor's obligation" is not relevant to any question of interference (or lack of it) with governmental function. Such fact is significant only in regard to the question whether there is a matured debt owing to the contractor which his creditor can reach. *Shechy* v. *Madison Square Garden Corp.* (1934) 266 N. Y. 44, 193 N. E. 633.

The single authority cited below as "analogous" which did not deal with such a garnishment is *State* v. *Blake* (1933) 88 Utah 584, 597-598, 20 P. 2d 871, 876-877, modified (1936) 88 Utah 600, 56 P. 2d 1347. At the pages cited in the opinion below, the Utah court—as did this Court in *Larson* (*supra*, pp. 11-12)—considered the policy behind governmental exemption from levy. There is nothing in the Utah court's opinion to suggest that it—any more than this Court in *Larson*—would "examine the necessity in each case" before upholding governmental exemption.

(b) The new formulation is unworkable.

A compelling practical basis for the rule prohibiting judicial examination of "the necessity in each case" in which a governmental exemption is invoked (see *supra*, p. 12) is that judicial procedures are ill suited to such examination. *Cf. East St. Louis* v. *United States ex rel. Zebley* (1884) 110 U. S. 321.

In the case cited, a Circuit Court had directed the city of East St. Louis to appropriate a certain portion of its annual tax revenue to satisfy a judgment against it, the court having determined that such portion was not necessary or required to "defray the necessary current expenses of said city" (110 U. S. at 323). This Court reversed, ruling the propriety and necessity of governmental expenses not to be judicial questions. Thus, the Court, per Mr. Justice MATTHEWS, observed (*id.* at 324):

> "the question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities."

The Court pointed out some practical reasons why the judiciary should not become enmeshed in such problems. Thus, Mr. Justice MATTHEWS continued (*id.* at 324-325):

> "No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

The language quoted is apt to the situation at bar. The Court of Appeals now proposes that the District Court undertake a "penetrating and thorough study" to determine the extent to which seizure of these particular funds would interfere with petitioner's public duties (319 F. 2d at 104, *infra* at p. 33a). Among the factors to be considered in this study are (319 F. 2d at 112-113, *infra* at pp. 50a-52a):

> (i) Is the entire hydroelectric project completed or does there remain "relevant work for others"?
>
> (ii) What, if any, claims may be expected from persons besides this plaintiff?
>
> (iii) What would be the effect of preventing the attached funds from "moving to the Reserve Account in the Bond Fund," i.e., will the attachment impair the District's financial standing in any substantial degree?

Although this suggested study would be incidental to a preliminary determination for jurisdictional purposes, resolution of considerations (i) and (ii) would be no less protracted than the trial of the lawsuit on its merits. The project could not be said to have been completed—and there could be no assurance that other contractors would not be necessary to finish the work—unless respondent established that it had erected an adequate dam, and had thus substantially performed its contract.[5]

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5. By repeated use of such expressions as "we are told" and "uncontradicted affidavits before us", the court below revealed its undeclared assumption that respondent was in the position of an established "creditor" which had "totally" completed the work for which it had been employed, and therefore had some sort of equity in the funds that had been raised to finance the project (319 F. 2d at 98, 102, 109, 111, 112, *infra* at pp. 20a, 27a, 43a, 48a, 50a-51a). In fact, respondent's claims of performance are bitterly disputed (see *supra*, p. 5). Respondent's self-serving affidavits are "uncontradicted" only because no question as to the merits of respondent's claim was—or is—presented by petitioner's motion to vacate the attachment.

Consideration (iii) would involve, among other things, determination of proper reserves to be set up against contingencies. Such matters are not suitable for judicial consideration. This conclusion is especially compelling where the judge called upon to make the determination would be one living some three thousand miles away from the project, who would presumably be wholly without background information as to the hydroelectric power systems of the Pacific Northwest.

Moreover, under the court's formulation, it would never be possible for a plaintiff, a defendant or a bank to determine the validity of any substantial attachment in advance of a judicial inquiry. In every case involving attachment of governmental property, the particular asset seized by a plaintiff would—under the new formulation—be immobilized while some court made a factual inquiry of the sort required by the Court of Appeals.

Indeed, a decision as to any particular attachment would shed no light on the validity of a subsequent attachment on the same or similar property. For example, if the instant attachment were vacated after the inquiry directed by the Court of Appeals and a new attachment were attempted a month later, the question then would be whether some court in New York thought enough progress had been made with the construction so that the new (or the same) plaintiff could then seize the funds without "substantial interference" with petitioner's public duties. On the other hand, if the instant attachment should withstand such inquiry and be upheld, the question next time would be

whether a court in New York then thought that respondent's seizure of $17,000,000 had rendered hazardous any further inroads on petitioner's funds.

The New York State courts would not adopt any such cumbersome and unworkable formula for determining jurisdiction over the governmental instrumentalities of sister states—especially in a case such as the one at bar, where the sister state provides forums for suits against its instrumentalities (*e.g.*, Rev. Code Wash. 54.16.110, *infra* at p. 66a).

(c) The new formulation is contrary to New York public policy with respect to suits against governmental instrumentalities.

There are two major facets of New York policy with respect to suits against its own governmental instrumentalities. First, New York has made those instrumentalities answerable for their acts, both in tort and in contract. Second, New York has decreed that suits against governmental instrumentalities may be prosecuted only according to such procedures and in such tribunals as the legislature may designate. N. Y. Court of Claims Act, §8; *Benz* v. *New York State Thruway Auth.* (1961) 9 N. Y. 2d 486, 490 174 N. E. 2d 727, 728, cert. dismissed (1962) 369 U. S. 147; *New York Post Corp.* v. *Moses* (1961) 10 N. Y. 2d 199, 203, 176 N. E. 2d 709, 710; *Brown* v. *Trustees, Hamptonburg School Dist.* (1952) 303 N. Y. 484, 488-489, 104 N. E. 2d 866, 868-869.

With respect to the facet of this public policy concerning the forum in which suits against governmental instrumentalities may be brought, the highest court of New York

has recently declared (*New York Post Corp.* v. *Moses*, *supra*, 10 N. Y. 2d at 203, 176 N. E. 2d at 710):

> "Decisions such as *Benz* v. *New York State Thruway Auth.* (9 NY 2d 486) are expressive of a constitutional and legislative policy that public authorities should be subjected only to those procedures which have been specifically mandated. '[T]here is no jurisdiction in any court of any suit against [an Authority] except as the Legislature has in terms created such jurisdiction' * * *."

In light of such unequivocal statement of its policy with respect to its own public authorities, New York would not impose a different rule upon a public authority of a sister state, and force it to submit to the jurisdiction of a court which had not been designated by the legislature of such state and which is situated some three thousand miles from the seat of the authority's operations.[6]

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[6] Insofar as the question has arisen elsewhere, it has almost without exception been held that the courts of one state will not permit the use of attachment to obtain jurisdiction over governmental instrumentalities of a sister state. *Eastern Union Co.* v. *Moffat Tunnel Improvement Dist.* (1934) 36 Del. 488, 178 Atl. 864; *W. K. Terry & Co.* v. *Hyde County, N. C.* (1929) 33 Ohio App. 118, 168 N. E. 562; *Parks Co.* v. *City of Decatur, Ill.* (6th Cir. 1905) 138 Fed. 550 (Kentucky law); *Board of Directors of St. Francis Levee District* v. *Bodkin Bros.* (1902) 108 Tenn. 700, 69 S. W. 270. *But cf. National Shawmut Bank* v. *City of Waterville* (1934) 285 Mass. 252, 189 N. E. 92. See also *O'Toole* v. *United States* (D. Del. 1952) 106 F. Supp. 804, 809 (unsuccessful attempt, based upon Delaware nonresident motorist statute, to obtain jurisdiction over District of Columbia), modified as to other defendants (3rd Cir. 1953) 206 F. 2d 912. Such decisions are based on the dual concept that it would be offensive to comity between the states to require an instrumentality of one state to subject itself to the judicial process of another, and that great public inconvenience would result from compelling a governmental instrumentality to carry on litigation in a distant forum. Thus, in *Eastern Union Co.* v. *Moffat Tunnel Improvement Dist.*,

To summarize: The "new" doctrine "developed and formulated" by the Court of Appeals is contrary to existing New York law. It is unworkable, and contrary to New York public policy. The New York courts would not adopt such a doctrine were a similar case to come before them. The case should therefore have been disposed of on the District Court's finding—affirmed by the Court of Appeals—that the petitioner had acquired the attached property in the course of governmental activities and was devoting it to public use.

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supra, the Supreme Court of Delaware declared (36 Del. at 505, 178 Atl. at 871):

> "We think that it would be an offense to the principle of comity between the states and productive of mischiefs of a serious and aggravated nature if the practice were to prevail of one state through its courts entertaining suits against agencies created by a sister sovereign to promote and advance its own public welfare, and subjecting those agencies to judgments and such executionary remedies as it might be in the power of the domestic court to enforce."

In *Parks Co.* v. *City of Decatur, Ill., supra*, the Circuit Court of Appeals for the Sixth Circuit observed (138 Fed. at 553):

> "because of the public inconvenience resulting from carrying on a litigation in a distant forum, the rule has become quite generally recognized that such [municipal] corporations cannot be sued elsewhere than in the venue of their location * * *."

II

The precedent established by the Court of Appeals is of far-reaching importance.

Subjoined as Appendix C is a list of seventeen representative bond issues underwritten in New York during recent years for out-of-state governmental instrumentalities. The borrowings referred to on this list alone total almost two billion dollars. Borrowers listed include governmental instrumentalities of seven states and the Commonwealth of Puerto Rico. Public projects financed by these representative borrowings run the gamut of governmental activity, including turnpikes, water systems, sewage systems, and airport facilities. Each of the listed bond issues was underwritten pursuant to an arrangement—similar to the one at bar—whereby a construction fund to assure completion of the project was established in a New York bank.[7] As can be deduced from the affidavit of John B. Dawson, Esq., petitioner's bond counsel (Joint Appendix, p. 88a), it is a practice of underwriters in this type of financing to require the security provided by such a construction fund.

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7. Every such "construction fund" is designed to provide security for bondholders, while leaving the borrower with sufficient flexibility to get ahead with the business of constructing a dam or other project. The question whether a trust valid against attachment can, as a practical matter, be created in such circumstances presents difficulties. Varying circumstances with respect to each borrowing result in differences in the documents used to deal with these difficulties. As indicated by the District Court in the instant case, where attachment of governmental property is attempted, application of New York law as to the nonattachability of such property makes it unnecessary to pass upon the effect of any particular trust instrument (207 F. Supp. at 447-448, *infra* at p. 12a; *cf.* 319 F. 2d at 104, *infra* at p. 33a).

The decision below, which affects the integrity of every such construction fund and any other New York deposits of sister state instrumentalities, jeopardizes every governmental instrumentality that may have sold such bonds in the immediate past, and complicates the problem of any such instrumentality that may in the future contemplate recourse to the New York market or that may have other needs for keeping funds in New York.

This consideration has become the more compelling with the taking effect on July 1, 1963 of the new amendment to Rule 4(e) of the Federal Rules of Civil Procedure (*cf.* 319 F. 2d at 102, *infra* at pp. 28a-29a). That amendment, giving attachment plaintiffs in diversity cases direct access to the federal courts, makes it unlikely that the New York courts will have an opportunity to reestablish the correct New York rule. With the newly formulated doctrine available in the federal courts, no attachment plaintiff with a substantial claim is likely to venture into a state court with its—for him—less favorable doctrine.

Conclusion

The incorrect statement of New York law newly developed and formulated by the Court of Appeals—which will result in an unwarranted extension of the jurisdiction of federal courts sitting in New York—should not be permitted to stand. Courts situated in the State of Washington are open to respondent's suit against petitioner. Petitioner should not be compelled to come to New York—three thousand miles from the seat of its activities—to defend an action involving its governmental functions. Nor should petitioner be required to establish before a court in New York its need for the $17,000,000 in governmental funds respondent has attached.

Prayer for Relief

Your petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit; and that, upon such review, the judgment of the Court of Appeals be reversed with directions that the order of the District Court be reinstated.

Respectfully submitted,

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